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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 171.

EDDIE V. HANNA,
PETITIONER,

v.

EDWARD M. PLUMER,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

GEORGE WELCH
9 Memorial Parkway
Randolph, Massachusetts
ALBERT P. ZABIN
73 Tremont Street
Boston, Massachusetts 02108
Attorneys for Petitioner

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Opinions Below

The opinion of the United States District Court (R. 13-15) is unreported. The opinion of the Court of Appeals (R. 25-29) is reported at 331 F.2d 157 (1 Cir., 1964).

Jurisdiction

Jurisdiction of the United States District Court was invoked under 28 U.S.C. 1332 (a) (1), the parties being citizens of different states (R. 3). The judgment of the Court of Appeals was entered on April 29, 1964 (R. 29). The petition for a Writ of Certiorari was filed on June 10, 1964, and was granted on October 12, 1964. Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Question Presented

Whether in a civil action, where the jurisdiction of the District Court is based on the diversity of citizenship between the parties, service of process shall be made in the mode and manner prescribed by state law or by the Federal Rules of Civil Procedure.

Statutes Involved

The statutory and constitutional provisions involved are U. S. Constitution Art. VI, cl. 2; 28 U.S.C. 2072 (1948); Rule 4 (d) (1) Federal Rules of Civil Procedure; Mass. Gen. Laws (Ter. Ed.) c. 197 § 9 (1958). They are presented in Appendix A, *infra*.

Statement

This is an action brought in the United States District Court for the District of Massachusetts in which Mrs. Eddie V. Hanna, a citizen of Ohio, seeks to recover damages of $100,000 for serious personal injuries sustained in an automobile accident caused by the negligence of a Massachusetts citizen now deceased and which occurred in South Carolina (R. 4-5). The defendant, a Massachusetts citizen, is

the decedent's executor. Jurisdiction of the United States District Court was based on diversity of citizenship. The defendant qualified as executor by filing a probate bond on March 1, 1962. (R. 13, 23). The complaint was filed on February 6, 1963, and on February 8, 1963, the deputy United States Marshal served the defendant, by leaving a copy of the complaint and summons at the defendant's last and usual place of abode in the hands of his wife, (R. 2) in full compliance with Fed. R. Civ. Pro., Rule 4(d) (1). The defendant filed his answer on February 26, 1963. (R. 1).

Mass. Gen. Laws (Ter. Ed.) c. 197, § 9, (1958) provides that actions against an executor must be "commenced within one year from the time of his giving bond." In addition to this requirement of timely commencement, the statute requires that before the expiration of the year the executor must be served in hand, unless a notice of the claim is on file in the appropriate registry of probate, or unless the executor "accepts" service. (The plaintiff's Ohio counsel did file such a notice, but it was technically invalid, as it did not state the name of the court in which the claim was pursued, R. 20-21).

The defendant propounded interrogatories to the plaintiff on August 5, 1963, (R. 1) and on August 26, 1963, moved for summary judgment on the ground that since jurisdiction was based solely on the diversity of citizenship between the parties, the failure of the plaintiff to make in hand service, as required by Mass. Gen. Laws (Ter. Ed.) c. 197 § 9 (1958), was fatal to the action. The District Court allowed the motion, and on appeal, the United States Court of Appeals for the First Circuit, Aldrich, J., affirmed. It is from this decision of the Court of Appeals that the petitioner appeals.

I. SERVICE OF PROCESS UPON AN EXECUTOR IN A "DIVERSITY CASE" IS GOVERNED BY THE FEDERAL RULES OF CIVIL PROCEDURE, AND NOT BY MASS. GEN. LAWS (TER. ED.) c. 197, § 9 (1958).

(a) *The requirement that the plaintiff served the defendant in accordance with State law rather than in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure establishes a rule of law which would destroy uniformity of procedure in the Federal Courts.*

Mass. Gen. Laws (Ter. Ed.) c. 197, § 9 (1958) is not an integrated statute, despite the fact that it contains but one paragraph. This statute is in part a statute of limitations, since it provides that an executor need not "answer to an action . . . which is not commenced within one year from the time of his giving bond . . . or to such action which is commenced within said year, unless before the expiration thereof the Writ in such action has been served. . . ." The case at bar does not involve this part of the statute for as the Court of Appeals noted, "(T)he action was commenced in time, and served in time. . ." *Hanna* v. *Plumer*, 331 F.2d 157, 159 (1 Cir., 1964), (R. 27) for purposes of the "ordinary" statutes of limitations, and a plaintiff commences an action, in Massachusetts, for purposes of the statute here involved, as well as for "ordinary" statutes of limitations, by delivering original process to the appropriate officer for service. *Gray* v. *Dahl*, 297 Mass. 260, 8 N.E. 2d 919 (1937); *Parker* v. *Rich*, 297 Mass. 111, 8 N.E. 2d 345 (1937).

Mass. Gen. Laws (Ter. Ed.) c. 197, § 9 (1958) also provides for the *manner* of service. Generally, under this statute service of process must be made by "delivery in hand." In the event that a plaintiff cannot, for one reason or another, obtain in hand service upon a defendant ex-

ecutor, he may file a notice of his claim in the appropriate probate court in strict compliance with the statute. See *Doyle* v. *Moylan*, 141 Fed. Supp. 95 (D. Mass., 1956). (Petitioner's Ohio counsel did file a notice of claim, within the year, but it was technically void for failure to state the court in which the action was to be commenced. R. 15). The filing of a notice is merely a substitute for the notification of a pending action incident to "in hand" service and is neither a condition precedent to the tolling of the statute of limitations, nor a condition precedent to the bringing of an action against an executor. *United States* v. *Saxe*, 261 F.2d 316 (1 Cir., 1958). Therefore, since the action was timely, the only issue in the case at bar, as the Court of Appeals recognized, is whether the Federal Court must require that an executor-defendant be given notice of an action against him in precisely the same manner as would be prescribed by a state court, even though the plaintiff has fully complied with the Federal Rules of Civil Procedure, 331 F.2d at 159.

The Court of Appeals, deciding the issue in favor of the application of the state rule, sought to justify its decision by reasoning that,

> "Special Statutes of Limitations to effectuate the safe and speedy settlement of estates that the heirs might be quieted,' (citation omitted) have been operative in the Commonwealth (of Massachusetts) for over 150 years. Relatively recent amendments *evince a clear legislative purpose* to require personal notification within the year, ascertainable of record." (emphasis supplied) 331 F.2d 159 (R. 27).

The court below seems mean that the test of whether a rule is substantive or procedural is the strength of the

legislative purpose of the state rule. The large number of cases involving the "Erie" problem attests to the difficulty in applying the "outcome determinative" test of *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99 (1945). However, the difficulties of applying the "legislative purpose" test of the court below will be insurmountable. A court will somehow have to decide in each case for each rule and statute whether the state purpose is strong or merely lukewarm. Furthermore, in each case the court will have to decide the degree of the strength of the legislative purpose necessary to place a state statute which is in conflict with a federal rule in the category of substantive law. What standards could be evolved to determine the strength of a state policy? The opinion below suggests none. The "legislative purpose" test of the court below will make it impossible for any counsel to rely on the Federal Rules of Civil Procedure for there will be little certainty a sufficiently strong "legislative purpose" may not turn his reliance into a fatal trap.

Furthermore, the reasoning of the Court of Appeals is inimical to the whole concept of a uniform Federal Civil Procedure which underlies the Enabling Act, 28 U.S.C. 2072 (1948), for the basis of the reasoning of the Court below is that the legislative policy of the Massachusetts legislature requires personal service, thereby making service of process a "substantive rather than a procedural matter." 311 F.2d 159 (R. 27).

Furthermore, once the standard of what is substantive and what is procedural is the "legislative purpose," uniformity in the application of the Federal Rules of Civil Procedure, in diversity cases is destroyed to the extent state that policies vary. In the matter of service alone, nearly half the states of the Union have rules or statutes governing service of process, which have stricter notice

requirements than do the Federal Rules.[1] The legislation of these states range from requirements that service be made upon a member of the defendant's family residing at his home (instead of upon any person of suitable age and discretion, Fed. R. Civ. Pro., Rule 4(d)(1)) to a requirement that the sheriff read the summons to the defendant. A few examples will suffice to demonstrate the utter chaos into which Federal procedure will be thrown if this Court does not reverse the court below.

California requires that service be made "personally," *Cal. Code of Civ. Pro.*, § 416, and the California courts have held that service upon a member of the defendant's family does not satisfy the statute, *Sternbeck* v. *Buch*, 148 Cal. App. 2d 829, 307 P.2d 970 (1957). Kentucky, *(Ky. Rev. Stat., Rules of Civil Procedure*, Rule 4.04) and Michigan, *(Mich. Rev. Jud. Act*, § 600. 1912 (1961) all require in hand service, and unlike the Federal Rules, the Rules and Judicature Act of Michigan, Maryland does not even permit service upon an agent *Md. R. Civ. P.* Rule 104 (b) (1) (2). *20 Tenn. Code Ann.* § 20-214 (1955) provides that "original process shall be served by reading the same to the defendant, or offering to read it in case he neglects or refuses to hear it read." Unless the terms of this statute are complied with, service is fatally defective, even though the defendant has actual first hand knowledge of the contents of the summons. *Carter* v. *Kaiser*, (Tenn. Ch. App.) 48 S.W. 265 (1895). New York permits substituted service

[1] In addition to Massachusetts, these states are: Arkansas (Ark St. 27-330 (1941)); California (infra); Florida (Fla. St. § 47.13); Idaho (Idaho Code § 5-507(7)); Illinois (infra); Iowa (Code of Iowa (1962) § 617.1 R.Civ.Pro. 56 (a)); Kentucky (infra); Maryland (infra); Michigan (infra); Missouri (Rev. St. Mo § 506. 150); Mississippi (infra); New York (infra); North Carolina (Gen. St. N.C. § 1-94); Pennsylvania (Penn R Civ Pro 1009(b)); South Dakota (S.D. Code § 33.0807(8)); Tennessee (infra); Virginia (Code of Va. § 8-51, 8-56); West Virginia (W.Va. Code (1961) § 5519, 5537); Wisconsin (Wisc. St. § 262.15 (1961))

upon a defendant only when with "due dilligence," *New York Civil Practice Law & Rules*, § 308(3), it is impossible to make "personal service upon a natural person . . . by delivering the summons within the state to the person to be served" or by delivering it to an agent designated in compliance with Rule 318 of the Practice Act. *New York Civil Practice Law & Rules*, § 308(1). Mississippi has requirements more stringent and bizarre than any of the other states. Mississippi requires in hand service; but, if the defendant, cannot "be found in the county," service may be made upon a member of his family who is "willing to receive" service. If the defendant is out of the county and no one in his family is willing to accept service, the summons must be posted "on a door of the defendant's usual place of abode." *Miss. Code Ann.* § 1869 (1942). See also *Ill. Rev. Stat.*, c. 110, § 13.2 (1961) (member of family upon whom service is made must be "informed" of contents and process mailed to defendant, unless in hand service is made).

The legislative purpose behind these service of process statutes and rules, as well as that behind Mass. Gen. Laws (Ter. Ed.) c. 197, § 9 (1958) is to assure the defendant of "personal notification." See 311 F.2d 159. Only the details in the method of the effectuation of this purpose varies, and there is no reason why all these statutes will not be held to have created substantive rights, if this Court affirms the ruling of the court below. Is the United States Marshall for the Districts of Mississippi now required to nail a Federal summons to the door of a defendant, if a person of "suitable age and discretion." *Fed. R. Civ. Pro.* Rule 4 (d) (1) is unwilling to accept service? Will a plaintiff in a District of Tennessee be denied a full hearing on the merits of his claim if the Marshall fails to read the summons (and the complaint, perhaps) to the defendant? Unless this Court reverses the decision of the court below,

the answers to these rhetorical questions will be in the affirmative.

Such ruling would destroy uniformity of procedure in service of process, and perhaps also in such matters as discovery, amendment of pleadings, and other procedural reforms of the Federal Rules which several states so far have not accepted. Such a ruling would, in effect, overrule *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958) and *National Equipment Rental Ltd.* v. *Szukhent et al.*, 375 U.S. 311 (1964). In *Byrd* v. *Blue Ridge Rural Electric Cooperative*, supra this Court held that it was proper to submit all issues in that suit to the jury, even though state law would have required that one issue be decided by the judge. One of the bases of that decision was the necessity for uniformity of Federal procedure. In *National Equipment Rental Ltd.* v. *Szukhent, supra*, the issue was:

> "Whether a party to a private contract may appoint an agent to receive service of process within the meaning of Federal Rule of Civil Procedure 4(d) (1) where the agent is not personally known to the party. . . ." 375 U.S. 315.

This court held in the affirmative, basing its holding on "well settled principles of the law of agency" and upon the proposition that there should be a "uniform federal standard," 375 U.S. 316. In the case at bar, as in *Szukhent*, this court in dealing with Rule 4(d) (1) of the Federal Rules of Civil Procedure, deals "with a Federal Rule, applicable to federal courts in all 50 states." 375 U.S. 316.

At least when a challenged rule falls within the constitutional boundaries suggested by Mr. Justice Brandeis in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the basis of the so-called *Erie* doctrine is "a *policy* (emphasis supplied)

that touches vitally the proper distribution of judicial power between state and federal courts." *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109 (1945). In the case at bar, the federal *policy* that the outcome of this litigation could be affected by the manner in which the defendant has been notified of the action. What is at stake, however, is the Federal policy, which has the sanction of Congress, *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940); *Union National Bank* v. *Lamb*, 337 U.S. 38, 41 (1949), and this court, e.g. *National Equipment Rental Co. Ltd.* v. *Szukhent*, 375 U.S. 311 (1964), of uniformity of Federal procedure throughout the Nation, so that a lawyer from one state may go into the Federal Court of another and not be trapped by the "procedural niceties" of state practice with which he is not familiar. See *Levinson* v. *Deupree*, 345 U.S. 648 (1953). The decision of the court below is unnecessary to effectuate the policy of *Guaranty Trust Co.* v. *York*, supra and is disastrous to the policy of the Federal Rules of Civil Procedure, and must be reversed.

(b) *The application of Rule 4(d)(1) of the Federal Rules of Civil Procedure in the case at bar is authorized and required by the Enabling Act, 28 U.S.C. 2072 (1948) and the Supremacy clause of the Constitution of the United States.*

If a federal rule of civil procedure does not "abridge, enlarge or modify any substantive right," 28 U.S. c. 2072 (1948), it must govern the aspects of litigation to which it applies, state laws to the contrary notwithstanding, *United States Constitution*, Art. VI, cl. 2. See 28 U.S.C. 2072 (1948).

Under the tests laid down by this Court, Rule 4 (d) (1) is clearly procedural. The test is "whether a rule really regulates procedure" which is "the judicial process for

enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940). The service of process is merely the method by which the court or the plaintiff gives notice to the defendant that a suit has been instituted against him, *Sechrist* v. *Palshook*, 97 Fed. Supp. 505 (M.D. Pa., 1951); Barron & Holtzoff, *Federal Practice and Procedure*, § 171 (1960), and the "procedure by which a court having venue and jurisdiction over the person of the party served asserts jurisdiction." *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438 (1945) (Rule 4f). Under these tests Rule 4(d)(1) is clearly procedural.

The application of Rule 4 (d) (1) in the case at bar does not, even remotely, affect the substantive rights of either litigant, for purposes of 28 U.S.C. 2072 (1948). It is clear that there is no question of the timeliness of the action, (R. f. 13). Therefore, this case is distinguishable from the case of *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945) on which the District Court relied (R. 14) and *Ragan* v. *Merchants Transfer Co.*, 337 U.S. 530 (1949) which the court of appeals cited. In *Guaranty Trust* the question raised was whether or not in a diversity equity case, the Federal Court would apply a state statute of limitations at all, and in *Ragan* this Court merely decided that commencing an action for purposes of Rule 3 of the Federal Rules did not toll the Kansas statute of limitations, for the reason that state law regarded the statute tolled only when service of process had been made. Service had actually been made some time after the time limited by the statute; and this court stated "(L)ocal law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. 531. In the case at bar, the action was filed within the one year

period of limitations, and service was made within the one year period (R. 1, 13). Reversal of the decision of the Court of Appeals would not extend the life of this action by one second.

Moreover, as the second circuit reasoned in the leading case of *Iovino* v. *Waterson*, 274 F.2d 41 (2 Cir. 1959) *cert. den. sub nom Carlin* v. *Iovino*, 362 U.S. 949 (1960) (Rule 25 held to permit substitution of foreign executor, state law to the contrary notwithstanding).

> "(I)t would unduly restrict the grant of authority made by Congress to hold that a rule contravenes the Enabling Act as abridging, enlarging or modifying substantive rights merely because a provision admittedly procedural in nature either furthers or prevents the enforcement of such rights" 274 F.2d 46

Federal Courts have long held that Congress has the power to provide for service of process in all actions in the federal courts, *Mississippi Publishing Corp.* v. *Murphree*, 326 U.S. 438 (1945), and that "state law cannot determine for the federal courts what shall be deemed sufficient service of process. . . ." e.g. *Insurance Co.* v. *Bangs*, 103 U.S. 435 (1880); *Beers et al* v. *Haughton*, 34 U.S. (9 Pet.) 329 (1835) (Story, J.); *Clark County Nevada* v. *City of Los Angeles*; 92 F. Supp. 28 (D. Nev., 1950). There is nothing in the history of the Enabling Act to indicate that Congress intended to change this doctrine, or to allow it to accomodate the "legislative purpose" of a state legislature.

The automobile accident which gave rise to this litigation occurred in South Carolina (R. 4-5). The only substantive rights involved in this case are those rights created by the law of South Carolina which would be recognized by the application of Massachusetts conflict of laws rules. Service of process is merely one step which merely relates to the

enforcement of those rights and cannot be said to be substantive.

Even with this Court's warning against a full reliance on conceptual analysis in mind, see *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 109 (1945), the analysis suggested is applicable here, for this case cannot be properly decided by a literal application of the "outcome determinative" test even as it should not be decided merely by applying the oft-condemned "litmus-paper test." In *Guaranty Trust*, as discussed above, the question was whether or not to apply a state statute of limitations. The issue was whether or not the action "should proceed at all," *Iavino* v. *Waterson*, 274 F.2d at 47; whereas, in the case at bar the issue is merely how should the defendant be given notice of a timely suit (to which there is no bar) which is properly brought.

The most important distinction between *Guaranty Trust* and the case at bar is that in *Guaranty Trust* there was absent any Federal legislation directed to the issue, while in the case at bar there is an irreconcilable conflict between a state statute and Federal rule with the force of a statute. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1940); *Union National Bank* v. *Lamb*, 337 U.S. 38 (1949). This aspect of the case at bar also distinguishes it from *Erie* cases such as *Klaxon Co.* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487 (1941), *Angel* v. *Bullington*, 330 U.S. 183 (1947), *Woods* v. *Interstate Realty Co.*, 337 U.S. 534 (1949), and *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208 (1939). The case at bar is also distinguishable from *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949), in which the Court of Appeals below saw a similarity to the case at bar, 331 F.2d 159. In *Cohen* this court held that there was no conflict between the Federal Rules of Civil Procedure and the state requirement that a bond must be furnished for costs. As a further ground of distinction between *Cohen* v. *Beneficial Loan*

Corp., supra, this court found in the state statute, involved there, an obligation and liability where none had existed before, which exposed a plaintiff to a new and substantial liability. *Iovino* v. *Waterson*, 274 F.2d at 47.

In view of the conflict of state statute with a valid Federal Rule, the refusal of the court below, to apply the Federal Rule violated the Supremacy Clause of the United States Constitution. In effect, it decided that the application of Rule 4 (d) (1) in the case at bar was beyond the rule making power of this court, because of Massachusetts legislative policy. If the Supremacy Clause, *U. S. Const.* Art. VI, Cl. 2, has any relevance to the Federal Judicial System, which is a creature of Article III of the Constitution and not of the Massachusetts legislature, the decision of the court below must be reversed. In "Erie" cases where the Federal courts have applied state law, they have done so to effectuate and further a Federal and not a state policy. cf. *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99 (1945). The court below did just the reverse. The Constitution requires the supremacy of federal law and therefore requires reversal.

Summary

The court below must be reversed. To permit the "legislative purpose" of a state to determine whether a federal rule of civil procedure is substantive or procedural would be to permit the introduction of such a degree of uncertainty into Federal litigation as to make it unsafe for any litigant to rely on compliance with the federal rules. Furthermore, permitting each state, in effect, to determine whether a federal rule is substantive or procedural would destroy uniformity of procedure in the federal courts. Both these disadvantages would occur without any corresponding benefit to any federal policy, for the method by which a

defendant is notified of the pendency of an action against him cannot remotely affect the result of the litigation, and no lawyer would choose the federal court simply because in hand service is not required. Finally, the result of the decision of the Court of Appeals is inconsistent with the mandate of Rule 1 of the Federal Rules that they be construed to achieve a "just" result. It seems unfair that a severely injured woman should be denied a full hearing on the merits because of a procedural technicality unimportant to the ultimate result of the litigation, when the defendant has not been prejudiced in any manner. Such a result should be avoided, particularly here, where to do otherwise would wreak chaos on uniformity of federal procedure. Therefore, your petitioner respectfully prays that the decision of the court below be reversed and this case be remanded to the district court for trial on the merits.

Respectfully submitted,

ALBERT P. ZABIN
73 Tremont Street
Boston, Massachusetts 02108
GEORGE WELCH
9 Memorial Parkway
Randolph, Massachusetts

Appendix A

UNITED STATES CONSTITUTION

Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. SEC. 2072 (Enabling Act)

Sec. 2072. Rules of Civil Procedure for District Courts:

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

• • •

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended May 24, 1949, c. 139, § 103, 63 Stat. 104; July 18, 1949, c. 343, § 2, 63 Stat. 446; May 10, 1950, c. 174, § 2, 64 Stat. 158; July 7, 1958, Pub. L. 85-508, § 12(m), 72 Stat. 348.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4—Process, (d)—Summons: Personal Service.

The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

MASS. GEN. LAWS (Ter. Ed.) c. 197, § 9 (1958)

Sec. 9. Commencement of Action: Extension of Limitations by Court

Except as provided in this chapter, an executor or administrator shall not be held to answer to an action by a creditor of the deceased which is not commenced within one year from the time of his giving bond for the performance of his trust, or to such an action which is commenced within said year unless before the expiration thereof the writ in such action has been served by delivery in hand upon such executor or administrator or service thereof accepted by him or a notice stating the name of the estate, the name and address of the creditor, the amount of the claim and the court in which the action has been brought has been filed in the proper registry of probate. . . .